FEDERAL CIRCUIT COURT OF AUSTRALIA

SINGH & ANOR v MINISTER FOR IMMIGRATION & ANOR *[2015] FCCA 1173*

Catchwords:
MIGRATION – Review of Migration Review Tribunal decision – refusal of skilled visas – English language test result found to be a "bogus document" – no jurisdictional error.

Legislation:
Migration Act 1958 (Cth)

Cases cited:
Rani & Anor v the Minister for Immigration [2015] FCCA 455

First Applicant:	TARSEM SINGH
Second Applicant:	HARJINDER KAUR
First Respondent:	MINISTER FOR IMMIGRATION & BORDER PROTECTION
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	ADG 240 of 2014
Judgment of:	Judge Driver
Hearing date:	5 May 2015
Date of Last Submission:	5 May 2015
Delivered at:	Adelaide
Delivered on:	5 May 2015

REPRESENTATION

The Applicants:	In person
Solicitors for the Respondents:	Ms C Stokes for the Australian

Government Solicitors

ORDERS

(1) The application filed on 1 July 2014 be dismissed pursuant to r.16.01 of the *Federal Circuit Court Rules 2001* (Cth).

(2) The Applicants do forthwith pay the first respondent's costs and disbursements of and incidental to the application, fixed in the sum of SIX THOUSAND, SIX HUNDRED AND FORTY SIX DOLLARS ($6,646.00).

(3)

FEDERAL CIRCUIT COURT

OF AUSTRALIA

AT ADELAIDE

ADG 240 of 2014

TARSEM SINGH
First Applicant

HARJINDER KAUR
Second Applicant

And

MINISTER FOR IMMIGRATION & BORDER PROTECTION
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

(Reasons settled from transcript)

1. This is an application to review a decision of the Migration Review Tribunal ("the Tribunal"). The decision was made on 6 June 2014. The Tribunal affirmed a decision of a Delegate of the Minister not to grant the Applicants Skilled Provisional Class VC visas. There are two Applicants who are husband and wife. The principal Applicant is the Applicant husband. Background facts relating to this matter are

conveniently set out in the Minister's Outline of Legal Submissions filed on 29 April 2015.

Background

2. The First Applicant (**the Applicant**), an Indian National, applied for the visa on 27 June 2011.[1] The Applicant was required to have competent English to be eligible for the grant of the visa: see Sch.2, cl.485.215, of the *Migration Regulations 1994* (Cth) (**the Regulations**). He was also required to satisfy public interest criterion (**PIC**) 4020,[2] which was in the following terms:

> a) (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal…a bogus document …in relation to:
>
> b) (a) the application for the visa;…

3. The term 'bogus document' is relevantly defined in s.97 of the Act to mean a document that the Minister reasonably suspects is a document that:

> a) (a) purports to have been, but was not, issued in respect of the person; or
>
> b) (b) is counterfeit or has been altered by a person who does not have authority to do so; …

4. In support of the visa application, the Applicant provided an 'IELTS Test Report' Form (**the test result**), dated 27 August 2011, which bore an image of a male person and contained test scores with an overall band of 7.5.[3] In assessing the visa application, the Delegate had regard to the test result and found that it was a bogus document. Accordingly, the application was refused.[4]

1 Court book (**CB**) 5-36.
2 See cl.485.224(a) of Sch 2 to the Regulations.
3 CB 36.
4 CB 64-69.

5. On 10 August 2014, the Applicant applied for review by the Tribunal.[5] On 1 May 2014, the Tribunal invited the Applicant to appear before it.[6] On 22 May 2014, the Applicant's representative provided a written submission to the Tribunal.[7] The submission was essentially that the 'authorities' made an administrative or clerical error in relation to the test result.[8]

6. On 29 May 2014, the Applicant appeared before the Tribunal.[9] On 30 May 2014, the Applicant supplied the Tribunal with a certified copy of the test result, but not the original, despite a request having been made by the Tribunal to that effect.[10]

7. On 6 June 2014, the Tribunal affirmed the Delegate's decision.[11]

The Tribunal's decision

8. The Tribunal commenced by noting that the issue on the review was whether the Applicant met PIC 4020. It then set out what the requirements of PIC 4020 were: [5]-[6].

9. The Tribunal noted the Delegate's finding that, according to the IELTS online verification system, a different photograph appeared on the test result to that which appeared on the online verification version. Further, the verification centre had in fact cancelled the Applicant's test result due to the indication that an impostor undertook the test on his behalf: [9]. The Tribunal went on to find that the test report was a bogus document within the meaning of s.97(b) of the Act on the basis that it was counterfeit, or in the alternative, that it fell within the meaning of s.97(a): [10]-[11].

10. The Tribunal next considered the Applicant's evidence and submissions regarding his explanation about the test result and related topics. It made a number of adverse remarks and findings about the Applicant's credibility. It described his evidence as not 'convincing' ([13]), 'unconvincing' ([14]) and it said that it had concerns and 'suspicions'

5 CB 70.
6 CB 71-72.
7 CB 73-80.
8 CB 80.
9 CB 81.
10 CB 82.
11 CB 86-93.

with the evidence: [15]. It also noted that the First Applicant produced no evidence to support his claim that there was an administrative error by the testing centre and also that he failed to produce the original test result: [13] and [15].

11. The Tribunal had regard to the Applicant's request for time to provide an IELTS test which he apparently undertook while overseas. It declined to grant more time. It gave detailed reasons for doing so: [17].

12. The critical paragraph then appeared at [18], where it said:

> *"Notwithstanding the various claims and evidence raised by the applicant over the course of this matter, the Tribunal has been left with a reasonable suspicion that the applicant's IELTS test report submitted with his application is counterfeit and is therefore a bogus document within the meaning of s.97(b). Further or alternatively, the Tribunal has been left with a reasonable suspicion that the applicant's IELTS test report purports to have been, but was not, issued in respect of the applicant and is therefore a bogus document within the meaning of s.97(a). The evidence on the Departmental file makes clear that the applicant provided a copy of this IELTS test report to an officer as relevantly defined. It follows that the Tribunal is not satisfied that there is no evidence before it that the applicant has given, or caused to be given, to the Minister and/or an officer a bogus document in relation to the application for the visa. Therefore, the applicant does not meet PIC 4020(1)."*

13. In relation to the discretion to waive the PIC 4020(1) and (2) requirements, the Tribunal found that there were no compelling or compassionate circumstances giving rise to the exercise of the discretion: [21].

14. The Tribunal considered whether the Applicant met the criteria for the grant of a subclass 487 visa and concluded that he did not: [23]. It also rejected the Second Applicant's application, as its outcome hinged on the success of the Applicant's: [24].

15. It concluded by affirming the decision under review.

16. These proceedings began with a show cause application filed on 1 July 2014. The Applicants continue to rely upon that application. There is one ground in the application:

"Regarding the present matter of different photographic image in IELTS records, I have no idea what is happening at their end. It must be their mistake in uploading my image or computer technical mistake in generating it. But now they are not cooperating and admitting their mistake. However, I have the original IELTS test result which I will submit at my hearing for your reference".

17. The Minister had some difficulty interpreting whether any assertion of jurisdictional error arises from that ground, and that difficulty is reflected in the Minister's submissions.

18. The first two sentences are in the nature of a narrative. They do not represent grounds of review but instead go to the merits of the Tribunal's decision. It is well-established that it is not for this Court to engage in a re-hearing of the merits.[12]

19. In any event, is clear from the Tribunal's reasoning that the Tribunal considered the submissions made on behalf of the Applicants including in relation to there being an administrative error by the testing centre: see [13]. Further, the Applicant was provided with an opportunity to respond the Tribunal's concerns about the evidence and claims, even with the benefit of an adjournment and input from his representative. Moreover, it was clearly open to the Tribunal to conclude that the test result submitted with the application was counterfeit, or, alternatively purported to have been, but was not, issued in respect of the Applicant and was therefore a bogus document within the meaning of s.97 of the Act.[13]

20. The last sentence of the ground suggests that the Applicants seek to further encroach on the boundaries of merits review by introducing fresh evidence which was not before the Tribunal. It is well settled that

[12] *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35-6 per Brennan J; *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259 at p.272; and *Minister for Immigration and Citizenship v SZJSS* (2010) 85 ALJR 306 at [26].

[13] See *Singh v Minister for Immigration, Multicultural Affairs and Citizenship* [2013] FCCA 1435 at [25], where Cameron J stated:

A failure to meet the requirements of PIC 4020 will occur if there is evidence of a bogus document having been submitted. If a document which is found to be bogus under the relatively undemanding test in s.97 has been submitted in connection with a visa application, no more is needed to show that there is evidence of the sort referred to in PIC 4020.

such a course is impermissible, unless it bears upon some alleged jurisdictional error.[14]

21. The Minister submits that there is no legal error, jurisdictional or otherwise, apparent and the application must therefore be refused. I agree.

22. The Applicants have had the opportunity to file and serve an amended application and additional evidence. They have not taken up that opportunity. The Applicant told me from the bar table today that he had possession of the original IELTS test result, although he had not brought it with him to Court. The application is supported by a short affidavit which I received as a submission. In that affidavit, the Applicants assert that they have no knowledge of the facts bearing on the assertion of photo substitution in the IELTS test result. I have before me as evidence the court book filed on 28 August 2014. I invited oral submissions from the Applicants today. They had not filed any written submissions.

23. The first Applicant, Mr Singh, reiterated that he does not know what may have happened in relation to the photograph on the IELTS test report, and emphasised that he and his wife were not involved in any dishonest behaviour. While that may be so, it is sufficient for the purposes of establishing the criterion for refusal on public interest grounds that there be a bogus document created in circumstances that point to dishonesty by some person who may not be the visa Applicant. Regrettably, the present circumstances are not unique.

24. I dealt with a similar fact situation in the case of *Rani & Anor v the Minister for Immigration* [2015] FCCA 455. A number of legal issues were raised in that case. I found that none of the asserted errors raised by the Applicants in that case had been made out. For the same reasons as expressed in that decision, to the extent that those same issues might be raised in the present case, I take the same view as I expressed in *Rani*.

[14] *NASB v Minister for Immigration and Multicultural and Indigenous Affairs* [2004] FCAFC 24 at [43] and [53] (with corrigendum), *SBBJ v Minister for Immigration and Multicultural and Indigenous Affairs* [2002] FCA 761 at [21] and the cases cited therein, *Yarlagadda v Minister for Immigration and Multicultural Affairs* [2001] FCA 1105 at [6]-[7], *Ozberk v Minister for Immigration and Multicultural Affairs* (1998) 79 FCR 249 at 254.

25. The conclusions reached by the Tribunal in the present case were open to it on the on the material before it. There was evidence before the Tribunal which supported its adverse findings. Whether or not the Applicants had any involvement in the photo substitution, the Tribunal was entitled to conclude that they had not satisfied the public interest criterion for the grant of the visas they sought. I conclude that the Applicants have failed to demonstrate any jurisdictional error by the Tribunal in the present case, and accordingly I order on a final basis that the application be dismissed.

26. In consequence of the dismissal of the application, the Minister seeks an order for costs in the sum of $6646. That was the scale amount applicable at the time the application to the court was filed. Mr Singh indicated that he might wish to pay costs by instalments, but did not oppose a costs order in principle. I am satisfied that costs of at least $6646 have been reasonably and properly incurred in this matter when assessed on a party and party basis.

I certify that the preceding twenty-six (26) paragraphs are a true copy of the reasons for judgment of Judge Driver

Associate:

Date: 7 May 2015